In the Supreme Court of the United States

OCTOBER TERM, 1916

THE BOARD OF WASHINGTON,

Plaintiff in Error,

v.

W. G. DAWSON & COMPANY, a corporation,

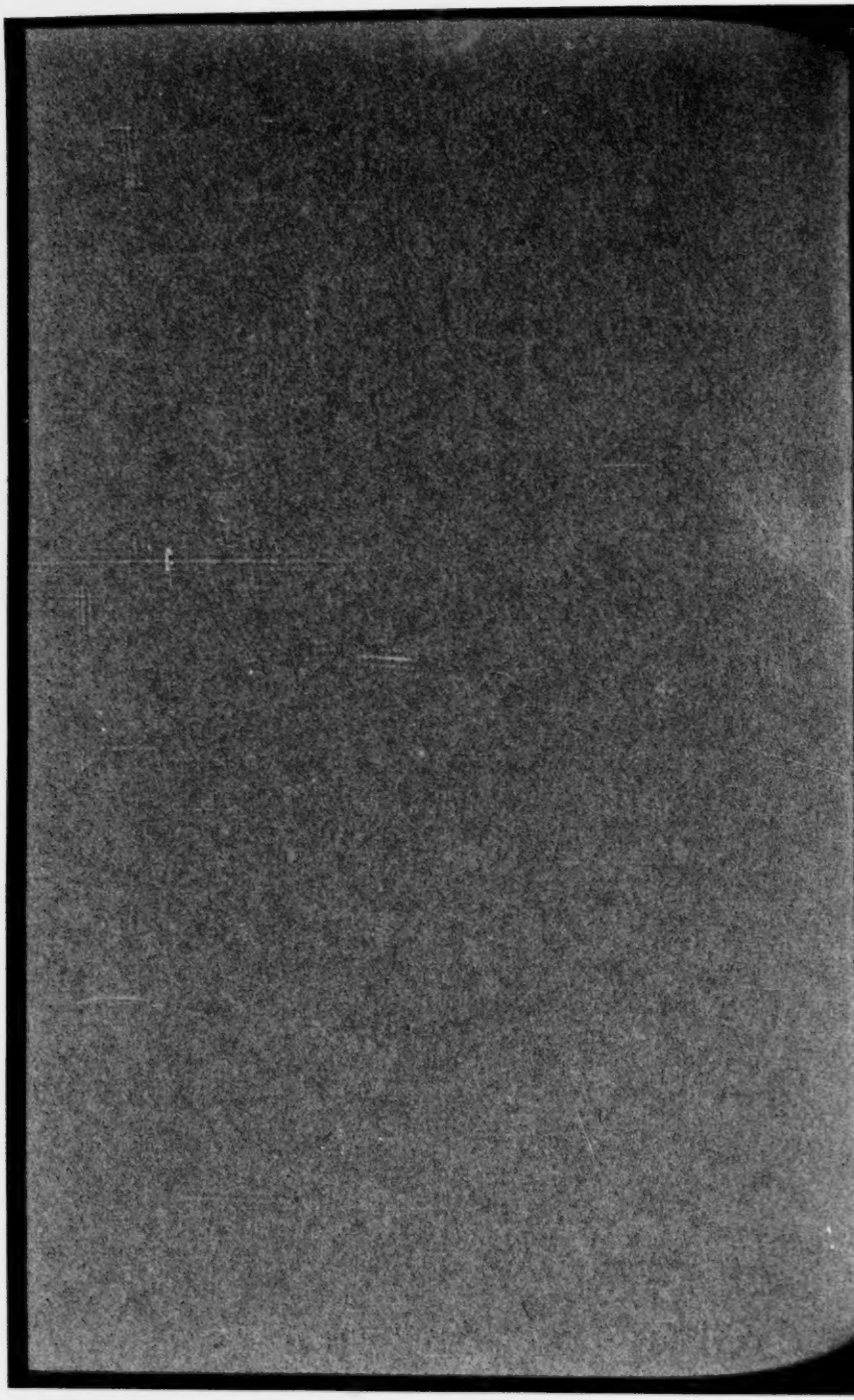
Defendant in Error.

ON WRIT TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF DEFENDANT IN ERROR

GOSSETT & THEUNIS,
Attorneys for Defendant in Error

Office and Postoffice Address:
2002 L. C. Smith Building, Seattle, Washington.



No.....

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE STATE OF WASHINGTON,
Plaintiff in Error,

v.

W. C. DAWSON & COMPANY, a corporation,
Defendant in Error.

ON ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF DEFENDANT IN ERROR

COSGROVE & TERHUNE,
Attorneys for Defendant in Error

Office and Postoffice Address:
2002 L. C. Smith Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

STATUTES CITED

CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE STATE OF WASHINGTON,
Plaintiff in Error,
—v.—
W. C. DAWSON & COMPANY, a corporation,
Defendant in Error.

No.....

ON ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF DEFENDANT IN ERROR

By and through the Constitution of the United States the powers of the government were separated into three classes, legislative, judicial and executive, and appropriate departments were created for each.

> "The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction; * * *" Sec. 2, Article III, Constitution.

The power was vested:

> "In one Supreme Court, and in such inferior courts as the Congress may from time to

time ordain and establish." Sec. 1, Article III, Constitution.

Under Section 8 of Article I of the Constitution, the legislative department, or Congress, was given power

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Pursuant to the Constitutional direction, Congress created the Judiciary Act of 1789. As was stated by this court in the case of *Knickerbocker Ice Company v. Stewart*, 64 L. Ed. 834, 253 U. S. 149:

> "The provision of Section 9, Judiciary Act, 1789 (chap. 20, 1 Stat. at L. 76), granting to United States district courts 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * *, saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it', was carried into the Revised Statutes (Secs. 563 and 711, Comp. Stat. Secs. 991, 1233), and thence into the Judicial Code (clause 3, sections 24 and 256). The saving clause remained unchanged until the statute of October 6, 1917, added 'and to claimants the rights and remedies under

the Workmen's Compensation Law of any state.' "

The court then declared the 1917 amendment to the saving clause unconstitutional saying:

> "Having regard to all these things, we conclude that Congress undertook to permit application of workmen's compensation laws of the several states to injuries within the admiralty and maritime jurisdiction, and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen.* It sought to authorize and sanction by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. And, so construed, we think the enactment is beyond the power of Congress."

The decision recognized the right of states to supplement the maritime law to some extent, and reference was made to *The Hamilton*, 52 L. Ed. 264, 207 U. S. 398, but the court denied the right of a state to modify, change or extinguish any portion of the maritime law or to modify, change or extinguish any maritime right. It referred to the New York Workmen's Compensation Act as follows:

> "The state enactment prescribes exclusive rights and liabilities, undertakes to secure

> their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court."

And then held that the doctrine of *The Hamilton* "may not be extended to such a situation."

The State of Washington has a Workmen's Compensation Act, which provides: (Remington's Compiled Statutes) Sec. 7673:

> "* * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Sec. 7682:

> "If any employer shall default in any payment to the accident fund or the medical aid fund, the sum due shall be collected by

action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. If such default be after demand, there shall also be collected a penalty equal to twenty-five per centum of the amount of the defaulted payment or payments, and the commission may require from the defaulting employer a bond to the state for the benefit of the accident and medical aid funds, with surety to their satisfaction, in the penalty of double the amount of the estimated payments which will be required from such employer into the said funds for and during the ensuing year, conditioned for the prompt and punctual making of all payments into said funds required during said year period, together with any penalty or penalties incurred. In case of refusal or failure after written demand personally served to furnish such bond, the state in an action brought by the attorney general in its name shall be entitled to an injunction restraining such delinquent from prosecuting an extra-hazardous occupation or work until such bond shall be furnished, and any sale, transfer or lease attempted to be made by such delinquent during the period of such default, of his works, plant or lease thereto shall be

invalid until all past delinquencies are made good and such bond furnished."

Sec. 7704:

"Every person, firm or corporation who shall violate or fail to obey, observe or comply with any rule of the department promulgated under authority of this act, shall be subject to a penalty of not to exceed two hundred and fifty dollars ($250). Such penalty may be recovered in a civil action in the name of the state, and shall be paid into the accident fund."

The foregoing sections of the Washington act are set forth for the purpose of showing that that act, like the New York act, "Prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court."

On June 10, 1922 Congress endeavored to reenact the 1917 amendment free from this court's objections by the passage of what plaintiff in error calls the "1922 amendment." A comparison of the two amendments shows the following differences.

1. The 1917 Act covered all "claimants"; the 1922 Act excludes masters and members of crews of vessels.

2. The 1917 Act did not attempt to force a suitor to take under a Workmen's Compensa-

tion Act; the 1922 Act does, since it provides "which rights and remedies when conferred by such law shall be exclusive."

3. The 1917 Act recognizes Workmen's Compensation Acts of "any state"; the 1922 Act is broader in that it recognizes Workmen's Compensation Acts of "any state, district, territory, or possession of the United States."

4. The 1917 Act gives the suitor the option of taking under the Workmen's Compensation Act or pursuing his remedy in the District Court; the 1922 Act gives the suitor no option, but does give to the legislatures of the various states, districts, territories and possessions of the United States, the option of leaving jurisdiction in the district courts or of taking it away, and upon such taking to prescribe the rights and remedies of the suitor and the corresponding responsibilities and liabilities of the employer.

The plaintiff in error advances the two following arguments:

First, the elimination of the master and members of the crew from the classification of "claimants" makes the amendment local in character and thus avoids interference with the harmony and uniformity of the general maritime law required by the constitutional grant;

Second, the withdrawal from the district court of jurisdiction in localities where Workmen's

Compensation Acts apply is such an abandonment of the field by the Federal Government that the states are free to act.

ANSWERING THE FIRST ARGUMENT.

We call attention to the fact that the Washington Workmen's Compensation statute is compulsory and exclusive. The Oregon statute (*Grant Smith-Porter Co. v. Rhode*, 66 L. Ed. 321, 257 U. S. 469) is elective. The New Jersey statute is optional. (*Netherlands American Steam Navigation Company v. Gallagher*, 282 Fed. 171). The New York statute is compulsory and exclusive. (*Knickerbocker Ice Company v. Stewart, supra*). Other state statutes are or may be compulsory and exclusive, or optional, or they may or may not have the same penalties or bases of awards. Other states may not have any Workmen's Compensation Acts at all.

If the 1922 amendment is valid, a vessel may this week touch at a Washington port and her owners perforce become subject to the Washington Workmen's Compensation Act. Next week it may touch at an Oregon port, and the owners find themselves under the Oregon act. The week following, the vessel may be in a California port, at which time the owners are forced under its act. A few weeks following, the vessel may be in the ports of a state having no Workmen's Compensation Act, and the owners are there subject to

the general maritime law. The responsibilities and liabilities of the ship and her owners change as the vessel moves from state to state.

A vessel and her owners may find themselves subject to similar changes in responsibilities and liabilities even in the same port. For illustration: Suppose a vessel today enters a Washington port, her owners find themselves subject to a Workmen's Compensation Act. The vessel leaves, and when it returns the legislature of the State of Washington may have changed its compulsory and exclusive act to an optional act. The vessel may leave and come again. This time it may find that the legislature has changed its whole scheme of workmen's compensation, and on a further visit it may be found that the legislature has abolished its Workmen's Compensation Act, with the owners' rights and liabilities fixed (by the state) according to the general maritime law.

All this time these vessels and their owners in our American ports will be subject to the general maritime law as to the claims of masters and members of the vessels' crews.

This legislation cannot be said to affect only American ships and thereby be local in character. Every foreign ship touching an American port would come within the law, and while they are not permitted to engage in coastwise trade, they are permitted to travel from one American port to

another in the discharge of cargo. They and their owners would become subject to the varying responsibilities and liabilities imposed by the various legislatures as the ship moves from state to state.

The 1917 amendment placed stevedores and masters and members of crews in the one general class, to-wit, "claimants." The plaintiff in error states that masters and members of crews move about from state to state, while stevedores are intransient; that by eliminating the transients from the class the act becomes local in character and legal effect, and therefore no longer violates the uniformity, harmony and consistency rule. If we are to admit that the 1917 amendment could be aided by the elimination of transients, we nevertheless observe that all of the transients were not eliminated in the enactment of the 1922 amendment. It may be that the latter amendment has eliminated all transient "claimants", but there are other transient persons (not "claimants" and not eliminated) who are legally interested in every maritime controversy raised by the instransient stevedores. The vessels, which under the maritime law are recognized as individuals, are transient. Owners' rights and obligations in legal effect move about from port to port and state to state as their vessels so move, and in that respect are transients. There can be no maritime commerce without the following elements, to-wit:

ships, ship owners, masters, crews and stevedores. Whenever one of the elements has a right as against one of the other elements, there exists a corresponding obligation. Under the general maritime law the right of an injured stevedore for damages was something more than an abstract idea. It was susceptible of enforcement against transient elements of maritime commerce, the vessel or its owner. To say that such rights of stevedores are local because the stevedores may not move from port to port, is to fail to take into consideration the fact that the corresponding obligations are those of transients.

This court further said in the *Knickerbocker* decision:

> "Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise a confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In *The Roanoke*, 47 L. Ed. 770, 189 U. S., 185, it was held that a state could not create liens for materials used in repairing a foreign ship. As stated before, the appellant claims uniformity because stevedores are said to be intransient. In the *Roanoke* case, causes of action of lienors (under the law of the State of Washington) were as local in character and effect as the causes of action of the stevedores now being discussed. It

was recognized that if foreign ships could be subjected to liens created by the State of Washington, they could likewise be subjected to liens created in the ports of the various other states of this country. Wherein is there uniformity, harmony, and consistency in the subjection of ships and their owners to the "onerous conditions and penalties" of various states Workmen's Compensation Acts as to stevedores when there is none in the subjection of the same ships and their owners to the claims of material men under state laws? Would anyone say that the decision in the *Roanoke* case would have been different if the lien act in question had excluded from its privileges those material men having offices and places of business in different states, and who might travel from state to state in the furnishing of supplies and materials?

In the *Roanoke* case the claimant had furnished material. The stevedores as claimants furnished labor. Clearly the uniformity, harmony, and consistency required in maritime matters is not to hinge upon the question of whether the claim of the claimant is one for labor or material. Neither is it to depend upon the question of whether the claimant may have a more or less permanent place of business or residence.

Plaintiff in error overlooks the fact that for every valid claim there is a corresponding obligation. The one cannot exist without the other.

There can be no harmony, uniformity, and consistency in the administration and judicial settlement of maritime "cases" unless all maritime elements of all the states are brought within and under the same rules and laws, or, in other words, the same judicial system.

The 1917 amendment was not found invalid because it included masters and members of crews in the classification "claimants". It was because the act was contrary to and interfered with the maritime "system of law". The exclusion instead of bringing harmony, uniformity and consistency, creates an even more discordant, multiform and inconsistent maritime "system of law".

In *Southern Pacific Co. v. Jensen*, 61 L. Ed. 1086, 244 U. S. 205, the court in referring to the New York Workmen's Compensation Act, said:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."
>
> "A far more serious injury would result to commerce than could have been inflicted

by the Washington statute authorizing a material man's lien in *The Roanoke*."

The plaintiff in error advances the argument that the case of *Western Fuel Company v. Garcia*, 66 L. Ed. 210, 257 U. S. 211, breaks down the uniformity rule set forth in the *Jensen* and *Knickerbocker* cases. Such an interpretation of the decision is not borne out upon examination. The court in that case said:

> "It is the established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land."

Since the death statute in question created a new legal liability the court, in effect, held that the local rule as to the statute of limitations might apply. Had the cause of action been one recognized by the Constitution as a part of the admiralty and maritime law, it would not have been subject to the local statute of limitations.

The decision in the *Grant Smith-Porter Ship Co v. Rhode*, *supra*, is also said to break down the uniformity rule.

The Oregon Workmen's Compensation law gave to the employer and the employee the option of declining to go under the act; that is to say, if either did not wish to come under the act, he was required to so notify the state authorities. If no such notice was given, the act became applicable to both. The certificate from the Circuit Court of Appeals stated:

> "Prior to the time of the injury, neither respondent, the employer, nor libellant, the workman, had notified the appropriate state authority of any rejection of the provisions of the Workmen's Compensation Act, and up to the time of the injury, respondent, the employer, had taken all the steps required by the compensation act to bring the work under its provisions; and there had been deducted and paid over to the Commission administering the compensation fund, payments from wages earned and paid libellant, the workman, up to the time of the injury."

This court held:

> "And as both parties had accepted and proceeded under the statute by making payment to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. * * * Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, *as between them-*

> *selves* (Italics ours) by a local rule, would not necessarily work material prejudice to any characteristic feature of general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

It was held that the contract for the construction of the vessel upon which Rhode was working at the time he was injured was nonmaritime, and further, that the general admiralty jurisdiction extended to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying in the navigable waters within the state. The right of Rhode to proceed in admiralty for the recovery of damages for his injuries was not dependent upon the question of whether the ship construction contract was maritime or non-maritime. It was dependent upon the question of whether or not he was injured upon the navigable waters, and if so, whether he had contracted away his right to proceed in admiralty.

The plaintiff in error seems to be confused as to the *Rhode* "contract". When the Court said:

> "Neither Rhode's immediate employment nor his activities at the time had any direct relation to navigation or commerce,"

it was evidently referring to the contract of employment, but when it says,

"And as both parties had accepted and pro-

> ceeded under the statute by making payment to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law,"

it undoubtedly referred to another contract impliedly created after the contract of employment was entered into. This other contract was in effect a relinquishment by the employer and employee Rhode of their rights to decline to come under the Workmen's Compensation Act. It must be remembered that both parties had paid into the state accident fund in order that Rhode might take therefrom in the event of injury. Under this implied contract Rhode in effect agreed not to bring any suit in the district court, or any other court, for the recovery of damages for injuries which he might sustain, but on the contrary to content himself with such an award as might be given him by the state compensation officials. After the contract of employment was entered into, the employer and employee had open to them several options. They could agree to take under the Workmen's Compensation Act; or if one declined and so notified the state authorities, the employee would have been entitled to have brought action in the district court for the recovery of his damages; or the employer and employee might have agreed to submit to arbitration such claims as the workman might have for injuries sustained.

It is possible that they might have been able to fix in advance as among themselves a scale of agreed damages.

The court did not state that the Oregon compensation statute could be given effect, because to do so would not "work material prejudice to the general maritime law". In effect it stated that the district court should not entertain the suit of one who had agreed with the other party to the controversy that he and they would look to no other statute, and so agreeing "among themselves", no material prejudice would be worked to the general maritime law.

In the case at bar we find no contract to forego any rights, no waiver, no estoppel. We are dealing with the naked question of the right of the state to force against their wills, employers and employees (the latter engaged in labor on the navigable waters of Puget Sound) to give up their right to submit their differences to the federal judicial power, and to take instead whatever the state may afford.

Neither the *Rhode*, *Nordenholt*, or *Kierejewski* cases cited by plaintiff in error, in any way modifies or changes any of the holdings of the *Knickerbocker* decision.

ANSWERING THE SECOND ARGUMENT.

The Washington Workmen's Compensation Act is exclusive as to both workmen and their employers. Does the 1922 amendment destroy the injured stevedore's maritime right to recover through the federal judicial power damages for his injury; or does it only prevent him from pursuing his right in the district court; or do his rights, notwithstanding the act, remain as they were prior to its passage? As hereinbefore stated the Constitution provides that,

> "The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction."

In the *Knickerbocker* decision the court pointed out that the states through the Constitution had adopted a maritime law, saying:

> "The Constitution itself adopted and established as part of the laws of the United States appropriate rules for the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction."

In *The Lottawanna*, 22 L. Ed. 654, 21 Wall 558, the court said:

> "That we have a maritime law of our own operative throughout the United States cannot be doubted. * * * One thing, however, is unquestionable; the Constitution

must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

This court further said in the *Knickerbocker* decision:

"The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress."

Neither Congress nor the states can extend or narrow the limits of the maritime law and admiralty jurisdiction.

In *The Lottawanna*, *supra*, this court said:

"The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it greater, or (it may be added) narrower than

the judicial power may determine those limits to be."

The Constitution imposed upon Congress the duty of creating the necessary inferior courts. The whole judicial power must be considered vested in such courts. The failure of Congress to create the necessary courts does not affect the scope of the judicial power.

In *Martin v. Hunter's Lessee*, 4 L. Ed. 97, 1 Wheat. 304, the Supreme Court, referring to the article creating and defining the judicial power of the United States, said:

> "The language of the article throughout is manifestly designed to be mandatory on the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. * * * Could Congress have lawfully refused to create a supreme court, or to vest it in the constitutional jurisdiction? * * * Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office. But one answer can be given to these questions: it must be in the negative. * * * The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at

their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution they might defeat the Constitution itself; a construction which would lead to such a result cannot be sound. * * * The first article declares that 'all legislative powers herein granted shall be vested in a Congress of the United States.' Will it be contended that the legislative power is not absolutely vested? That the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that 'the executive power shall be vested in a President of the United States of America.' Could Congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department? * * * The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all. * * * It would seem, therefore, to follow that Congress are bound to create some

inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority. * * * The admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts * * * in which the principles of the law and comity of nations often form an essential inquiry. * * * The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever. * * * No parts of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance. * * *"

Congress cannot take anything away from the vested judicial power.

In *Den v. The Hoboken Land and Improvement Co.*, 15 L. Ed. 372, 18 How. 272, the Supreme Court said:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination."

Although it is the duty of Congress to provide the necessary courts and the proper laws for the carrying out of the powers granted by the Constitution, it cannot delegate any of its duties or legislative power to the states. In the *Knickerbocker* decision, this court said:

> "Its (Congress') power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legis-

> lation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. * * * The subject was intrusted to it (meaning Congress) to be dealt with according to its discretion—not for delegation to others. * * * Congress cannot transfer its legislative power to the states—by nature this is non-delegable."

It does not seem that there is any question that stevedores working upon navigable waters of the United States are engaged in maritime pursuits, and that their injuries while so working are maritime, and that their rights and liabilities are clearly within the admiralty jurisdiction.

In *Southern Pacific Co. v. Jensen, supra*, the court said:

> "The work of a stevedore in which the deceased was engaged, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction."

Since long before the enactment of the Constitution, seamen injured in employment upon navigable waters have been by virtue of the general maritime law entitled to receive wages, maintenance and cure. Other workmen have been en-

titled to receive more. It is doubtful whether Congress has authority to pass a law to the effect that no seamen shall have any right to receive wages, maintenance and cure when injured, or a law taking from the stevedore his right to recover damages when injured, without providing compensation from some other source. It is to be noted that in the passage of the 1922 amendment Congress has not declared "no compensation."

It has attempted to separate the injured workmen into two classes.

First, the masters and members of vessels' crews, whose rights and remedies remain as before the passage of the amendment; and,

Second, all other workmen, including stevedores, whose rights and remedies shall be contingent upon the existence of a state workmen's compensation act, at the point where the injuries are received.

The device used to create the separation was the attempted elmination of the jurisdiction of district courts as to the causes of action of injured members of the second class. Even though the district court may have lost its jurisdiction, the injured members of the second class still have a right to have compensation fixed by or through a federal forum. In *The Siren*, 19 L. Ed. 129, 7 Wall. 152, in *The Davis*, 19 L. Ed., 875, 10 Wall. 15, and in *The Avon*, No. 860 Fed Cas., the court held that the existence of a

lien is not dependent upon the ability of the claimant to enforce it.

In *Chelentis v. Luckenbach*, 62 L. Ed. 1171, 247 U. S. 372, the court held:

> "The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. * * * And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' "

The right of the seaman to wages, maintenance, and cure, and the stevedore for damages,

did not come into being by reason of any Congressional act. It was recognized by and through the adoption of the Constitution. While it may be that Congress has authority to enact legislation modifying or changing this right, nevertheless it cannot delegate to a state its mixed privilege and duty, either directly or indirectly, by specific act or the attempted throttling of the judicial power.

Congress by the creation of the district court did not create judicial power. It only manufactured judicial machinery. The same creative powers which provided for Congress itself, at the same time created judicial power, and by adoption established the maritime and admiralty law of the United States.

Let us further examine the situation, assuming the 1922 amendment to be valid. Suppose we start with the state of New York, for the purposes of illustration, and assume that it has no Workmen's Compensation Act. It must then be admitted that the United States District Court is open to injured stevedores for the recovery of damages sustained while working upon the navigable waters in that state. In other words the district court has jurisdiction. The judicial machinery is ready to perform its function. Suppose that tomorrow the legislature passes a Workmen's Compensation Act, the same taking effect immediately. At once, so far as the steve-

dore is concerned, the federal judicial machinery, which today might be exercised on his behalf, has become paralyzed. Suppose further, that on the day following, the same legislature repeals its Workmen's Compensation Act. Immediately the paralyzed federal judicial machinery is given life, and is ready to function. To state the situation in another way, the jurisdiction of the District Court is dependent upon the acts of the New York legislature, and as it is so dependent upon that legislature, other District Courts are likewise dependent upon the acts of other legislatures. We might liken the jurisdiction of the federal District Court to a lighted electric lamp. With the federal power on, it furnishes light to stevedores. Upon a state pushing a legislative electric button, the power is turned off and the light goes out, with darkness for stevedores. Another push of the legislative button, and the federal judicial power is restored. There are as many buttons as there are "states, districts, territories, and possessions of the United States." The federal judicial power is impotent at the will of a state legislature.

The argument of the plaintiff in error that the federal government has withdrawn from this particular field, and having so withdrawn, the states may enter, is incorrect as a statement of fact. Correctly stated, Congress has not attempted to withdraw, but has issued a permit to the states to effect the federal withdrawal at their

pleasure. This is beneath the dignity of the government of the United States. It is unthinkable that the federal District Court must have the legislative permission of the states to exercise the federal judicial power.

Through Section 2, Article III of the federal Constitution heretofore set out, the judicial power is extended to cases other than "admiralty and maritime." If Congress by the elimination of a judicial forum can take maritime cases from federal judicial power, then it may take other cases away, and continue the whittling away process until the whole judicial department, including this Court, has lost its power. The Constitution of the United States will have thereby become altered or repealed in a way not provided for by its makers. If Congress can wipe out the judicial power, what is to hinder it from destroying the executive power? Nothing would better please the radicals and misguided uplifters of this country than to discover such an opportunity to break down our Constitution.

This particular amendment was recently held unconstitutional in *Farrel v. Waterman S. S. Co.*, 286 Fed. 284, the Court saying:

> "But under the constitutional provisions the admiralty court must have jurisdiction of this admiralty and maritime law as so altered or amended. It is one thing to make or alter a law, and quite another thing to

declare what it is as written. The one is legislative, the other judicial. It is one thing to write a law, and quite another to declare by what tribunal it shall be construed.

"The Constitution gave one of these functions to the Legislature, and the other to the courts. Congress has no more right or power to take away from the federal courts their jurisdiction to hear and construe the laws than the courts have to assume the power to write the laws. That the maritime law referred to in the Constitution was the general uniform system in force when the Constitution was adopted is held in the *Lottawanna* and the *Jensen* cases, and in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. In the *Jensen* case it was held no state could change or alter this uniform system. In the *Knickerbocker* case it was held that Congress could not delegate to the states the power to change or alter the uniformity of the system.

"Even a casual reading of the reports both to the House and the Senate shows that this is just what the present amendment was intended to do. The act makes the rights and remedies, when conferred by the state, territory or district, exclusive, after limiting such

provisions to persons other than the master or members of the crew of a vessel. It then denies jurisdiction to the District Courts as to actions arising out of injuries to or death of persons other than the master or members of the crew, where compensation is provided for such person by the Workmen's Compensation Law of any state, district, or territory, but fails to confer this jurisdiction upon any other federal court. Some federal court must have jurisdiction of 'all cases of admiralty and maritime jurisdiction.' *Martin v. Hunter*, 1 Wheat. 326, 4 L. Ed. 97.

"The work of a stevedore is as much of a maritime character as that of a seaman. *The Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; *So. Pacific Co. v. Jensen*, 244 U. S. 217, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A., 1918 C, 451, Ann. Cas. 1917 E, 900. So it is as much within the jurisdiction of the admiralty courts. It is difficult to see how Congress could refer to the states the right to make varying provisions for stevedores, if they could not do so as to seamen."

From the foregoing the following conclusions must be deduced:

1. The federal judicial power cannot be extended, narrowed, or given away by Congress.

2. Congress is charged with the duty of provid-

ing judicial machinery and making the necessary laws to carry out the judicial grant. It cannot evade or refuse to perform its duty.

3. The 1922 amendment contravenes Section 2, Article III of the Constitution of the United States, insofar as it attempts a delegation of either judicial or legislative powers to the states.

4. It further contravenes the same section and article of the Constitution insofar as it attempts to withdraw jurisdiction from the federal judiciary as to the specified admiralty and maritime cases.

5. The attempt to deprive the District Court of jurisdiction is a nullity since Congress has provided no substitute federal forum.

6. The 1922 amendment failing, the action at bar is without support, and the decision of the state Supreme Court should be affirmed.

Respectfully submitted,

COSGROVE & TERHUNE,

Attorneys for Defendant in Error

Robert S. Terhune

Howard B. Cosgrove